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Federal Communications Commission
Office of the Secretary

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re Application of

THE FIDELIO GROUP, INC.

For A Construction Permit
Channel 282B (104.3 MHz), New York, NY

File No. BPH-910502MQ

To: Chief, Mass Media Bureau

REPLY TO OPPOSITION
TO PETITION TO DENY

GAF BROADCASTING COMPANY, INC.

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Date: February 20, 1992

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Summary

GAF Broadcasting Company, Inc. ("GAF"), licensee of WNCN(FM), New York, NY, herein replies to the Opposition of The Fidelio Group, Inc. ("Fidelio") to GAF's Petition To Deny its application ("Petition"). As detailed in GAF's Petition, the Fidelio application was unacceptable for filing because its antenna proposal would violate the Commission's RF radiation guidelines, minimum coverage requirements and/or grandfathered short-spacing limitations.

Concurrently with its Opposition, Fidelio filed a petition for leave to amend which, if granted, would sharply raise the height of its proposed antenna some 128 feet, roughly 12 stories. It is upon this proffered amendment, rather than its current proposal, which Fidelio relies in attempting to dispel the serious issues raised by GAF. As more fully detailed in GAF's Opposition To Petition For Leave To Amend, filed today, Fidelio's amendment must be rejected as an obvious untimely attempt to cure acceptability defects after the absolute deadline. Accordingly, Fidelio is left with its original technical statement, which remains defective.


Even if the FCC rules permitted such curative filings, Fidelio's amendment does not resolve the RF radiation issue. While Fidelio relies on the steel walls of the Chrysler Building to attenuate RF energy, the holes in this surface would allow RF radiation to pass through to the interior of the building and might be electrically resonant at Fidelio's

proposed frequency, creating higher field strengths inside the building than if no metal "shield" existed. Furthermore, the panels of the building's spire are likely to reflect about half of Fidelio's signal upward at about a 45 degree angle, resulting in severe coverage losses and raising the potential for interference to aircraft communication and navigation systems.

Fidelio also asserts that the phasing of multiple antenna elements to achieve an omnidirectional pattern is common and may be used as a corrective measure to overcome shadowing or multipath problems. In such antennas, however, the elements are numerous, close together, and on a structure with a relatively small diameter. In contrast, Fidelio's proposal to mount multiple antennas on a building face of approximately 70 feet would be unprecedented.

Fidelio's application is also unacceptable for filing because of its failure to include an environmental assessment ("EA"), or even to identify the Chrysler Building as a National Landmark subject to environmental processing, as required by the FCC rules. Contrary to Fidelio's contention, an EA is clearly required where, as here, an action will affect significant buildings in American history and architecture listed on the National Register of Historic Places. Fidelio's argument that it "effectively provided" an EA strains belief. Its application contained none of the specific, detailed information required by the FCC rules, and failed to even reveal that the Chrysler Building was an historic landmark.

Fidelio also erroneously claims that its proposal will have no adverse environmental impact. In this regard, Fidelio wrongly



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**REPLY TO OPPOSITION
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GAF Broadcasting Company, Inc. ("GAF"), licensee of WNCN(FM), New York, New York, herein replies to the Opposition of The Fidelio Group, Inc. ("Fidelio") to GAF's Petition To Deny the above-captioned application ("Petition").^{1/}

Fidelio's application remains unacceptable for filing despite its untimely and unjustified attempt to cure defects in its technical proposal by amendment. Moreover, Fidelio's claims do not excuse its failure to prepare and file the required environmental assessment, without which its

^{1/} On January 23, 1992, GAF requested a three-week extension of time until February 20, 1992 in which to prepare and file this Reply.

application was fatally defective. For these reasons, Fidelio's application must be dismissed.^{2/}

I. DESPITE FIDELIO'S ATTEMPT TO RELY UPON AN UNTIMELY AND UNJUSTIFIED AMENDMENT, ITS TECHNICAL PROPOSAL REMAINS IN VIOLATION OF COMMISSION RULES.

GAF's Petition demonstrated that the Fidelio application was unacceptable for filing because its technical proposal would violate several FCC rules and requirements. Fidelio now attempts to avoid this inescapable conclusion by filing a Petition For Leave To Amend ("Fidelio's Petition"), seeking to correct its fatal deficiencies. The Commission's rules, however, prohibit the filing of such an untimely amendment intended to correct acceptability defects. Moreover, even if its amendment were accepted, Fidelio's application would still be defective, and must be dismissed.

A. Fidelio's Amendment Cannot Be Accepted.

As detailed in GAF's Petition, the Fidelio application was unacceptable for filing because it would violate important technical requirements:

^{2/} Ironically, Fidelio accuses GAF of filing its Petition in order to delay this proceeding (Opposition at 1) after Fidelio itself sought two extensions of time, totalling nine weeks, before proceeding. To compound the fault

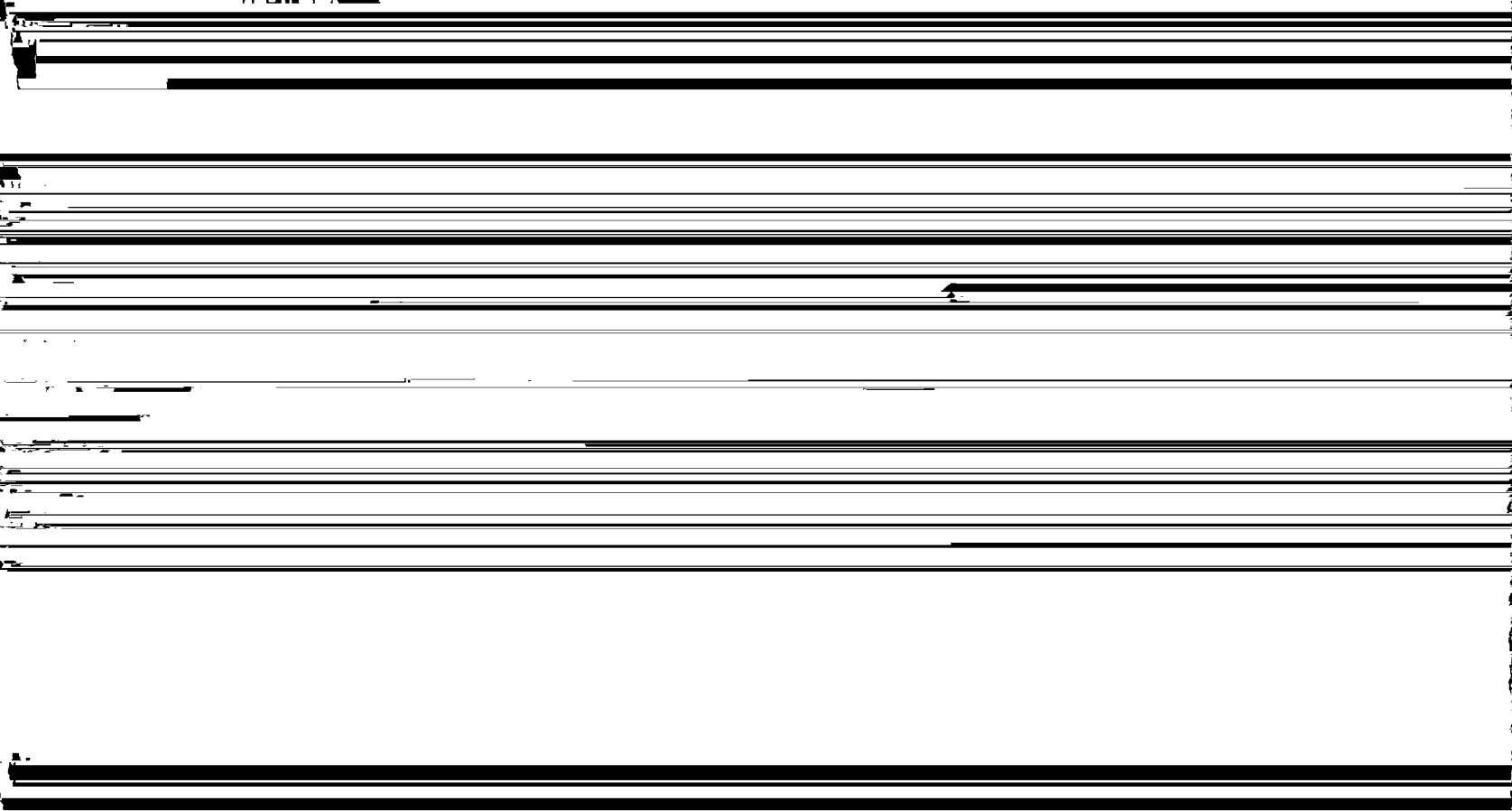
- First, based on FCC-accepted calculation methodology, RF radiation from Fidelio's proposed site would exceed the Commission's guidelines for human exposure.
- Second, the shielding or other corrective measures necessary for Fidelio to meet the RF radiation guidelines would effectively limit Fidelio's coverage to less than 80% of New York City, contrary to Section 73.315(a) of the FCC rules.
- Third, the only way requisite city coverage could be obtained is by increasing power. However, because of the distorted coverage pattern produced by Fidelio's corrective measures for RF radiation, its 1 mV/m contour would extend beyond that of WNCN, violating the "grandfathered" short-spacing restrictions imposed by Section 73.213(a) of the FCC rules.

Fidelio's Petition claims that the antenna height proposed in its application "as originally filed" did not "accurately reflect" the location on the Chrysler Building which is available to it, "apparently" due to "some miscommunication" between the Building's and Fidelio's engineers. If granted, Fidelio's amendment would raise the height of its proposed antenna 128 feet, or roughly 12 stories, from 699 feet to 827 feet above ground.

Fidelio's proffered amendment is not, as its Petition claims, "little more than a 'housekeeping' matter," which will have "virtually no effect on any aspect" of its application. On the contrary, the obvious purpose of that amendment is an untimely attempt to cure some of the fatal technical defects pointed out by GAF's Petition. Thus, Fidelio's Opposition argues that its antenna is not likely to cause excessive exposure to RF radiation because, under its amended proposal,

the nearest offices would be four floors away. Opposition at 3. Again, relying upon its amendment, Fidelio seeks to answer the signal distortion issue by claiming it is highly unlikely that shielded glass or any corrective measures will be necessary.^{3/} Opposition at 5. As more fully detailed in GAF's Opposition To Petition For Leave To Amend, filed today, Fidelio's amendment must be rejected as an obvious untimely attempt to cure acceptability defects. (It is requested that GAF's Opposition be incorporated herein by reference.)

Accordingly, Fidelio is left with its original proposal, which remains in violation of Commission rules. Indeed, Fidelio's amendment only demonstrates the fundamental flaws in its existing proposal. For example, Fidelio boasts that its proposed site would be located at least 40-50 feet above the



B. Even Were Fidelio's Amendment Accepted, Its Application Would Fail To Comply With The Commission's RF Radiation Requirements.

Fidelio's amendment does not in any event resolve the defects shown by GAF's Petition. Attached hereto as Exhibit 1 is a Technical Statement prepared by Steven J. Crowley of the engineering firm du Treil, Lundin & Rackley, Inc. Mr. Crowley states that because of inconsistencies in Fidelio's Opposition, the efficacy of its proposed RF radiation control measures cannot be determined. This renders Fidelio's application defective, even as amended.

For example, Fidelio's principal, T'ing C. Pei, recounts his personal inspection of the new antenna site and notes that there are "unwindowed steel surfaces with holes punched through, through which holes numerous transmitting antennas protrude." Opposition, Attachment A, at 2. Fidelio notes elsewhere that it will rely on the building's "steel shield" to "attenuate RF energy to a degree that the ANSI guideline will most likely be satisfied." Id., Attachment B, at 5.

Mr. Crowley demonstrates that these statements are at odds. If the steel surface has holes in it, the holes would allow RF energy to pass through to the interior of the building. Worse, depending on the geometry of the holes, they may be electrically resonant at Fidelio's proposed frequency. Such a phenomenon could create field strengths inside the Chrysler Building even higher than would be the case if there was no

metal "shield" at all, resulting in high RF radiation levels in the offices on the top floors of the building. Technical Statement at 2. Fidelio fails to address this issue.

Mr. Crowley believes that another problem will arise if Fidelio relies upon the metal surface of the Chrysler Building to shield the interior. The panels on the spire of the building will likely reflect about half of Fidelio's signal upward at roughly a 45-degree angle, based on the fact that about one-half of these panels are tilted upward by this amount, leading to severe coverage losses. The reflecting effect of these panels also raises the potential for interference to aircraft communication and navigation systems, as high radiofrequency energy will appear in unexpected areas.

Technical Statement at 2.

It is an applicant's burden to demonstrate that its proposed facility will comply with the Commission's radiation guidelines. Fidelio has not met that burden.

C. Fidelio Has Not Shown That It May Employ A Multiple Element Antenna To Overcome Shadowing Problems.

GAF's Petition also refuted Fidelio's assumption that it could employ an antenna with multiple elements on the Chrysler Building as a corrective measure to overcome shadowing or multipath problems. In Opposition, Fidelio notes that the spacing of multiple antenna elements to achieve an omnidirectional

Fidelio also claims that there are "numerous examples" of multiple element antenna systems such as the one it is proposing. Id., Attachment B at 2.

is proposing to mount its antenna. Even in that easier case, however, it was noted by CBS engineers that the antenna pattern suffered "deviations from circularity."^{4/} Technical Statement at 3.

Fidelio also cites WTFM as a previous FM tenant of the Chrysler Building. However, Mr. Crowley's attached Statement demonstrates that this station's pattern was severely distorted from the omnidirectional. Based on a model used by the manufacturer of WTFM's antenna, Mr. Crowley believes that the WTFM antenna was mounted on a finial cross-section of about five feet. In contrast, Fidelio's antenna would be mounted on a cross-section of the building of approximately 70 feet and is likely to produce greater distortion. Technical Statement at 3-4.

Fidelio also asserts that WNCN's use of a multi-element antenna on the Empire State Building renders GAF's arguments invalid. Opposition at 7, n. 6. But Fidelio ignores fundamental differences between its proposal and WNCN's antenna and site. The Empire State Building antenna, which WNCN shares, is on a portion of the building having a much smaller cross-section than Fidelio's proposed location on the Chrysler

^{4/} See Engineering Statement Associated with Application for Construction Permit to Change Location, Install a New Transmitter and Antenna System for WCBS-FM, New York, NY, July 25, 1950 at 3, File No. BPH-1633.

Building. The antenna shared by WNCN also has several times

requirements or the city grade coverage and separations rules. Fidelio proposes to locate the antenna for its new FM station on the spire of one of the most famous and architecturally-distinct buildings in the world, New York City's Chrysler Building. Because this building is listed on the National Register of Historic Places ("National Register"), the Commission's rules implementing the National Environmental Policy Act of 1969 ("NEPA")^{5/} and the National Historic Preservation Act^{6/} required Fidelio to disclose this fact and submit an Environmental Assessment ("EA"). 47 C.F.R. Sec. 1.1307(a)(4). It failed to do either. These omissions rendered Fidelio's application incomplete, defective, and unacceptable for filing. The three arguments advanced by Fidelio in an effort to save its application from dismissal are unavailing.

A. Fidelio Was Clearly Required To Submit An Environmental Assessment But Did Not.

Fidelio first contends that "it is far from clear that, in the peculiar circumstances presented here, any formal environmental assessment was, in fact, required." Opposition at 7. On the contrary, the FCC rules are crystal clear.

^{5/} 42 U.S.C. Sec. 4321 et seq.

^{6/} 16 U.S.C. Sec. 470 et seq.

Section 1.1308(a) requires an applicant to prepare an EA for any action which may have a significant impact under Section

~~1.1307. Section 1.1307(a)(4) states that actions which effect~~

evaluation of an EA, they do not excuse an applicant from filing the EA in the first place.

In its Petition For Leave To Amend, Fidelio claims "categorical exclusion" from the Commission's EA requirement on two grounds.^{8/} First, Fidelio claims exclusion pursuant to Section 1.1306(b), Note 1, which provides as follows:

The provisions of § 1.1307(a) requiring the preparation of EAs do not encompass the mounting of antenna(s) on an existing building or antenna tower unless § 1.1307(a)(4) is applicable (emphasis supplied).

However, Sec. 1.1307(a)(4) is applicable, since Fidelio proposes to mount its antenna on the Chrysler Building, which is listed in the National Register. Thus, Note 1 on its face does not supply Fidelio with its claimed exclusion.

Fidelio also claims exclusion under Note 3 to Sec. 1.1306(b). Note 3, however, applies only to the construction of a new antenna tower or supporting structure on an established "antenna farm." Fidelio does not propose to construct a new tower at an existing antenna farm, but rather

^{8/} Significantly, these legal arguments regarding interpretation of Notes 1 and 3 to Sec. 1.1306(b) of the rules appear only in Fidelio's Engineering Exhibit, not in the body of its Petition or its Opposition, where such statements would require attestation by counsel and thus be exposed to the rigors of Sec. 1.52 of the Commission's rules.

proposes to mount its antenna on an existing building, a situation which is dealt with by the Commission in Note 1, not Note 3. Moreover, even if the Chrysler Building could be considered an "antenna farm," it still would not be exempt from the EA requirement since the private radio "whip" antennas presently mounted thereon are by no stretch of the imagination "similar" to the obtrusive (at least 2-bay) FM antenna proposed by Fidelio. See infra at 18-19; Technical Statement of Steven J. Crowley, Exhibit 1, at 6-8; Declaration of Rolf Ohlhausen, FAIA, Exhibit 2, at 2.

B. Information Submitted By Fidelio Does Not Satisfy
The Requirements Of Sec. 1.1311.

In conflict with its other arguments, Fidelio's second argument is that it "effectively provided" an EA because its application included "ample information" from which the Commission could evaluate the possible environmental effects of the proposal and took "pains" to "allay" the Commission's concerns. Opposition at 7-8.^{9/} This argument strains belief. Section 1.1311 of the FCC rules requires that an EA contain

^{9/} The additional claim that "Fidelio took pains to advise the Commission that its proposed antenna site is the Chrysler Building" (Opposition at 7) is disingenuous since the critical fact under the Rules -- that the Chrysler Building is a National Historic Landmark -- was not disclosed. It is also meaningless, since Fidelio has not obtained the local zoning and historical preservation approvals necessary under the FCC environmental processing rules.

specific, detailed information, including a "statement as to the zoning classification of the site," a "statement as to whether construction of the facilities has been a source of controversy on environmental grounds in the local community," a "discussion of environmental and other considerations which led to the selection" of the site, a discussion of any alternative sites which may have been "or might reasonably be" considered, and "evidence of site approval which has been obtained from local or federal land use authorities." 47 C.F.R. Sec. 1.1311(a)&(c). Fidelio complied with none of these specific requirements.10/

Furthermore, Section 1.1311(b) requires that an EA contain information of "sufficient detail to explain the environmental ~~consequences~~" and enable the Commission to determine the impact

47 C.F.R. Sec. 1.1311(b). Fidelio did not even disclose, let alone discuss, the fact that its proposed antenna site is a

Amendment of the Commission's Environmental Rules, 3 FCC Rcd 4986, 65 RR 2d 116, 117, n. 6 (1988) (incorporating provisions of National Historic Preservation Act and other laws into NEPA Rules). Fidelio violated this directive.

C. Fidelio's Proposal Would Have An Adverse Environmental Impact On The Architectural Integrity Of The Chrysler Building.

Third, Fidelio incorrectly argues that its proposal will not have any adverse environmental impact.^{12/} Opposition at 8-9. Fidelio attempts to downplay the impact of the antenna by describing it as having the width of a "conventional door" (Opposition at 8), ignoring the fact that the length of the type of antenna Fidelio will require will probably be about nine feet. Technical Statement at 8. In any event, it is safe

to say that the visual impact even of a door hanging off the side of the Chrysler Building is something that the Commission cannot simply ignore.

Moreover, Fidelio wrongly assumes that the view from the street is the only consideration in assessing the impact of an installation on an historic building. Obviously, a skyscraper may have a number of notable details, not visible from a distance or ground level, the alteration of which would have an adverse impact on historic preservation. See Exhibit 2 at 3. Indeed, the Chrysler Building is particularly notable for such details, as is apparent from its description in the National Register Nomination Form. The building's spire is composed of symmetrical stainless steel arches diminishing to a dramatic needle point. See GAF's Petition To Deny, Exhibit 1 at 6, Exhibit 2. Thus, Fidelio's proposed antenna would protrude from one of the most architecturally distinct features of the Chrysler Building. (Indeed, its obtrusive antenna may protrude from all sides of the spire.)

Fidelio also attempts to seek solace in the fact that

headset antennas were once (but are no longer) mounted on the

1988, and before the Department of the Interior placed the Chrysler Building on the National Register in 1976.^{13/} Those previous applicants did not have to comply with the EA requirement simply because it did not exist at that time. Accordingly, the fact that broadcast antennas were placed on the Chrysler Building at one time (and subsequently removed) does not excuse Fidelio's disregard of current FCC requirements.

Next, Fidelio claims that the presence of land mobile service antennas on the Chrysler Building should obviate any concern as to its proposed FM antenna. Opposition at 9. It does not. Fidelio asserts, with no support, that antennas typically used in this service are "not significantly different" from the antenna it proposes, although it provides no data about the antennas actually used on the Chrysler Building (or whether those antennas were authorized only after submission of an EA). In fact, antennas used in the land mobile services are generally far smaller than FM broadcast antennas. In his attached Technical Statement, Mr. Crowley explains that because the antennas employed by land mobile services use low operating powers (only a fraction of that

^{13/} WCBS-TV was authorized to operate on the Chrysler Building in 1941, BI-PCT-2; WCBS-FM was authorized to operate on the Chrysler Building in 1950 as an "interim"

processed by Fidelio) they are manufactured with smaller

nor his upbringing exempts him from the Commission's environmental processing requirements. Indeed, the fact that Mr. Pei is an urban planner (and should have known better) makes all the more serious his failure to disclose to the Commission that Fidelio intended to use an historic landmark as its antenna site.

Moreover, Mr. Pei's confidence in Fidelio's proposal is not shared by an architect with considerable experience in landmark preservation projects generally and with projects requiring the New York City Landmark Commission's approval. Attached hereto as Exhibit 2 is the declaration of Rolf Ohlhausen, FAIA, a principal in the architectural firm of Prentice & Chan, Ohlhausen in New York City. Mr. Ohlhausen is registered with the National Council of Architectural Registration Boards in New York and other states. His experience with landmark projects includes the Chrysler Building. Mr. Ohlhausen has prepared a scale drawing depicting the appearance of a typical two-bay broadcasting antenna on the Chrysler Building spire.

Based upon the information available, Mr. Ohlhausen's expert opinion is that the FM antenna proposed by Fidelio is not "similar" in size or potential adverse esthetic impact to the private radio whip antennas presently mounted on the Chrysler Building, as Fidelio claims. Mr. Ohlhausen believes that the mounting of an FM broadcasting antenna at the height proposed by Fidelio would interfere with the grace-

ful geometry of the Chrysler Building spire and the addition of the